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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1184

NORMAN BENNETT,
Petitioner,

v.

FORD MOTOR COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

No opinion was issued below. The judgment of the Court of Appeals sought to be reviewed affirmed an order of the District Court, also without opinion, granting summary judgment for respondent. The Court of Appeals' judgment is attached as an exhibit to the Petition.

JURISDICTION

The jurisdictional grounds in this case have been adequately stated in the Petition.

QUESTION PRESENTED

The question presented in this case is not that stated by petitioner.

The question instead, is *whether a private cause of action for invasion of privacy arose out of the inspection by respondent's counsel of certain of petitioner's Navy service records where the inspection was pursuant to a valid, outstanding subpoena duces tecum and authorized by Navy Regulations and Judge Advocate General's Department.*

More particularly, since there was no opinion issued by the court below and its decision is strictly limited to the facts of this case, the question is whether that inspection constituted an actionable invasion of privacy when: (1) the records were relevant to petitioner's qualifications as an expert witness in the pending suit; (2) respondent was advised by the Navy Judge Advocate General's Office that the records could be obtained under Navy Regulations by subpoena; (3) respondent's counsel issued such a subpoena in strict compliance with Rule 45 of the Federal Rules of Civil Procedure, with reasonable notice to opposing counsel; (4) opposing counsel made no effort whatsoever to quash or modify the subpoena; and (5) pursuant to the subpoena and after further notice to opposing counsel the records were examined for the purpose of determining which would be necessary for trial, with the approval and under the supervision of the Judge Advocate General's Department, commencing while petitioner's counsel was present.

STATUTES AND REGULATIONS INVOLVED

In addition to the Regulations set forth by petitioner, the following statute and Regulations are involved in this case:

Statute:

Administrative Procedure Act, Section 3(c), 60 Stat. 238, 5 U.S.C. §1002 (c) (1958):

> "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

Regulations:

32 C.F.R. §701.2 (d):

> "*Exceptions.* Where not in conflict with the restrictions in paragraphs (a) and (b) of this section relative to confidential matter, the production in Federal, State, Territorial, or local courts, of the service, employment, pay, or medical records (including medical records of dependents) of persons in the naval service is authorized upon receipt of a court order, where litigation is pending without procuring specific authority from the Secretary of the Navy. Where travel is involved, it must be without expense to the Government or to the person producing the records."

32 C.F.R. §701.2 (b):

Part of this section is set forth in the Petition. The Petition, however, omits the following:

> " * * * The Secretary of the Navy, or his designee may make such records or information therefrom available to persons properly and directly concerned whether or not litigation is involved."

STATEMENT OF THE CASE

This is a simple tort case which both courts below found in effect without merit, and which presents no basis, constitutional or otherwise, for review by this Court. Petitioner's complaint, filed after he lost a suit against

respondent for patent infringement,[1] sought to recover five million dollars for the alleged invasion of his privacy resulting from the examination of his Navy personnel records by counsel for respondent during the patent suit trial preparations to check petitioner's claimed qualifications as an engineer based upon his education and experience while in the Navy, to testify that in his expert opinion, respondent had infringed his patent.[2]

Although not mentioned in his petition, petitioner was given timely and full notice in writing of respondent's proposed course of action with respect to inspection of his records[3] and he knew that the Navy Department intended to permit such inspection.[4] Although he had almost two weeks in which to do so, petitioner nevertheless chose not to take any action whatsoever at that time to question in the court where his case was pending, the propriety or validity of the subpoena which was the basis for the Navy Department's intended action.[5]

As it turned out, none of the information or documents were actually used in the patent trial.[6] The instant suit was based upon only eight specific documents,[7] all of

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[1] *Bennett v. Ford Motor Co.*, 1963, 117 U.S.App.D.C. 34, 325 F.2d 230, cert. denied 377 U.S. 932.

[2] Affidavit of Laidler B. Mackall, paras. 3, 4, Joint Appendix (hereafter referred to as J.A.) 10-11.

[3] Mackall affidavit, para. 7, J.A. 11-12.

[4] Affidavit of Lt. Col. Thomas B. Sparkman, USMC, para. 6, J.A. 25; Mackall affidavit, para. 9, J.A. 12.

[5] See Sparkman affidavit, para. 6, J.A. 25; Fed.R.Civ.P. 45(b) provides that the proper procedure for contesting the validity of a subpoena is to file a motion to quash the subpoena in the court out of which it issued.

[6] Mackall affidavit, para. 15, J.A. 15

[7] See J.A. 36-47.

which were rather routine in nature.[8] The only "publication" of the eight documents complained of in the present action, other than examination by respondent's counsel in the presence of his own secretary and the official custodian, was the result of court-required production in the present case.

Respondent filed a motion for summary judgment supported, inter alia, by affidavits of counsel, of the Judge Advocate General Department's officer actually supervising the inspection and the opinion by the administrative officer designated by the Secretary of the Navy to control release of information from the naval personnel records of individuals involved in litigation that the inspection was authorized by the applicable statute and regulations.[9] The District Judge entered an order granting summary judgment[10] and the Court of Appeals affirmed without opinion.[11]

No claim for violation of any constitutional right was made by petitioner either in the trial court or in the Court

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[8] Five of the eight documents were fitness reports, the first characterizing petitioner as an officer of "average" ability whose performance of duty was "satisfactory and nothing more". The second report notes petitioner would have to show improvement in certain areas for retention. However, endorsement attached to the final fitness report relied upon by petitioner is extremely complimentary since it states that petitioner had "performed excellent work" and had "demonstrated that he is a responsible young officer of promise". J.A. 43. This final evaluation is substantiated by petitioner's subsequent three promotions to the rank of lieutenant commander before retiring in 1949 for physical disability. The remaining three documents relate to an airplane accident in which petitioner was injured. These documents clearly exonerate petitioner from any responsibility for the accident and in no way reflect adversely upon his character, ability or reputation.

[9] J.A. 10-16, 16-19, 24-26.

[10] J.A. 48.

[11] See Appendix to Petition.

of Appeals. Petitioner claims in his petition here an "unconstitutional invasion of his privacy" (page 2). Significantly however, nowhere in the petition does he set forth the constitutional basis for this contention.

ARGUMENT

1. No Constitutional Issues Raised.

Petitioner himself did not even refer to, much less rely upon, any provision of the Constitution in the District Court or the Court of Appeals. The judgment below, being without opinion, therefore holds only that under the facts of this simple tort case, the inspection by a private defendant of plaintiff's naval service records pursuant to a valid, outstanding subpoena in connection with pending litigation did not constitute an actionable invasion of plaintiff's privacy. All that is involved is whether an actionable tort has been committed by a private party in the process of litigation as a private party. No constitutional issues are in any way presented and no amount of empty semantics can convert this case into one warranting review by this Court on certiorari.

2. No Broad or Important Questions of Law Involved Affecting the Public Interest

The decision does not hold, or even suggest, as petitioner states, that a "veteran's service record may be examined with impunity, if such veteran is involved in litigation" (page 4). Rather, at the very most, it merely holds that a private cause of action for invasion of privacy does not arise out of the mere inspection by a defendant's counsel in connection with pending litigation of certain of plaintiff's naval personnel records when: (1) it reasonably appears that the records were relevant to determine petitioner's claimed qualifications to testify

as an expert witness in the pending suit;[12] (2) respondent is advised by the Navy Judge Advocate General's Office that production and inspection of the records could be obtained under Department of the Navy Regulations by directing a subpoena therefor to the custodian of the records;[13] (3) respondent's counsel in strict compliance with Rule 45 of the Federal Rules of Civil Procedure, accordingly issues such a subpoena with notice to opposing counsel;[14] (4) opposing counsel makes no effort to quash or modify the subpoena;[15] (5) pursuant to the subpoena and further notice to opposing counsel, the records were examined with the approval and in the presence of their custodian,[16] for the purpose of determining which would be necessary for trial.[17]

Since no opinion was issued in this case, the decision which is strictly limited to the facts of this case, is no precedent for any new rule of law and the decision affects no one other than petitioner. Nor can the significance of the decision be artificially increased by petitioner's implication that the American Legion will seek to file a brief amicus here in order to "safeguard the right of

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[12] Also relevant to possible question of credibility in view of petitioner's three prior personal injury suits. See Mackall affidavit, paras. 4 and 5, J.A. 11; Letter of September 24, 1962 to Office of Department of the Navy, Office of the Judge Advocate General, J.A. 21.

[13] Mackall affidavit, para. 6, J.A. 11.

[14] Mackall affidavit, para. 7, J.A. 11-12.

[15] As required by Rule 45(b). Sparkman affidavit, para. 6, J.A. 25.

[16] Petitioner's counsel, who was present during the first day of this examination, knew that in the absence of court action quashing or modifying the subpoena, the examination would be completed within the following day or so.

[17] Mackall affidavit, paras. 7-11, J.A. 11-13.

privacy of veterans' files and records" (page 6). He made a similar attempt to have the American Legion file a brief amicus before the Court of Appeals but no such action was there taken by the American Legion and there is no reason to believe that the Legion will seek to intervene here when it did not do so in the Court of Appeals.

3. No Federal Question Involving Violation of Federal Statute or Regulation

Petitioner's unequivocal assertion that the Navy regulations involved "specifically declare such records as *confidential and privileged and immune from scrutiny*" (page 4), flies in the very teeth of the language of the Navy regulations themselves as well as the statute upon which they are based. Thus the statute, which was not mentioned or set out in the petition, states: "matters of official record *shall* in accordance with published Rule *be made available to persons properly and directly concerned.*[18]

This permissive language of the statute is reflected in the Navy Regulations which state the records are confidential "*except to persons properly and directly concerned.*" § 701.1(e). That respondent, a party to litigation in which the service records are pertinent, is "properly and directly concerned" is made clear by Section 701.2(d) which expressly authorizes the production of "the service, employment, pay or medical records . . . of persons in the Naval service . . . upon receipt of a Court order, where litigation is pending" and by Section 701.2(c) which states the procedure for obtaining production of those records where they "are desired by or on behalf of litigants."

Furthermore, Section 701.2(a) makes such records available whenever "authorized by the Secretary of the

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[18] Administrative Procedure Act § 3(c), 60 Stat. 238, 5 U.S.C. § 1002 (c) (1958) (Emphasis Added)

Navy or his designee". The inspection in this case was specifically authorized by the Secretary of the Navy's designee, the officer in charge of the records.[19]

Finally, that the inspection in this case was in full accord with the applicable statute and regulations is established by the opinion to this effect, entitled to great weight, of the administrative officer designated by the Secretary of the Navy to control the release of information from service records in connection with pending litigation.[20] The decision below, contrary to petitioner's assertions, does not violate those regulations but rather gives effect to their clearly intended purpose.

4. There Is No Conflict of Decision

The decision below is fully consistent with all relevant precedent. Petitioner's contention that the decision "controverts other rulings of the federal courts" (page 5) is simply not supported by the six cases he cites. Five decisions involved the production of certain records of the Justice Department, Selective Service Commission and Interstate Commerce Commission and are clearly distinguishable in that: (1) in each case the party whose records were involved, unlike petitioner here, made a timely objection to the Court against their production; (2) in each, unlike the regulations here, there were no provisions for release or production of the records; and (3) none of the cases involved or even considered the question whether an examination of the records by a private party gave rise to a cause of action for damages for invasion of privacy.

Only one decision is cited involving a suit for invasion of privacy, *Bernstein v. National Broadcasting Co.*, D.C.,

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[19] See Sparkman affidavit, paras. 6-8, J.A. 25-26.

[20] Affidavit of Gale E. Krouse, J.A. 16.

D.C. 1955, 129 F.Supp. 817, aff'd 1956, 98 U.S.App.D.C. 112, 232 F.2d 369, cert. denied 352 U.S. 945. This case, setting out the elements which must be present to state a cause of action for invasion of privacy, is not only consistent with but compels the decision of the Court of Appeals here. Of the four prerequisites listed in *Bernstein* as uniformly required,[21] all are lacking here. These are: (1) the examination of the records must be *wrongful* (not wrongful here because pursuant to an outstanding subpoena and authorized by statute, regulation and the record custodian); (2) there must be *publication* of their contents;[22] (no publication here before the present action, prior inspection limited to respondent's counsel, his secretary and the official custodian in addition to petitioner's counsel); (3) examination must be *unwarranted*[23] (not unwarranted here because relevant to pending litigation and pursuant to valid, outstanding subpoena) and;

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[21] 129 F.Supp. at 831.

[22] *Peterson v. Idaho First National Bank*, 1961, 83 Idaho 578, 367 P.2d 284; *Patton v. Jacobs*, 1948, 118 Ind.App. 358, 78 N.E. 2d 789; *Gregory v. Bryan Hunt Co.*, 1943, 295 Ky. 345, 174 S.W. 2d 510; *Voneye v. Turner*, Ky. 1951, 240 S.W. 2d 588; *Hawley v. Professional Credit Bureau, Inc.*, 1956, 345 Mich. 500, 76 N.W. 2d 835; *Lewis v. Physicians & Dentists Credit Bureau*, 1947, 27 Wash. 2d 267, 177 P.2d 896.

[23] A communication privileged as part of a pending judicial proceeding for purposes of libel and slander is similarly privileged for purposes of an action for invasion of privacy. See Warren & Brandeis, *The Right To Privacy*, 4 Harv. L.Rev. 193, 216 (1890). That this privilege applies to the inspection of records pursuant to Court subpoena in connection with pending litigation is clear. See e.g., *Borg v. Boas*, 9 Cir. 1956, 231 F.2d 788, 794; *Brown v. Shimabukuro*, 1941, 73 U.S.App.D.C. 194, 118 F.2d 17, and other cases cited on pp. 26-28 of Appellee's Brief before the Court of Appeals in this case. On the question of waiver of the right to privacy in this case, see *Tooley v. Provident Life & Acc. Ins. Co.*, La. App. 1963, 154 So.2d 617, *writ refused*, 244 La. 1019, 156 So.2d 226; *Forster v. Manchester*, 1963, 410 Pa. 192, 189 A.2d 147.

(4) the contents must be such that their publication *"would cause mental suffering, shame or humiliation to a person of ordinary sensibilities"*.[24] (As we have seen, footnote 8, page 5, in none of the documents, the examination of which is complained of, was there the slightest adverse reflection on petitioner's loyalty, morality, integrity or any other aspect of his character which would have caused "mental suffering, shame or humiliation".)

Thus the decision of the Court of Appeals here is fully consistent with and supported by both the *Bernstein* case and the numerous other cases defining actionable invasion of privacy.[25] The decision here, therefore, is neither novel nor significant except to the parties. The facts simply fall short in every required respect for making a case for invasion of privacy.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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[24] 129 F.Supp. at 831.

[25] See cases cited in notes 22 and 23, *supra*.